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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

THE PEOPLE, Plaintiff and Respondent, v. DARRIN BRUCE McCULLOUGH, Defendant and Appellant.	C062108 (Super. Ct. Nos. SF08325, SF07245B)

After finding that defendant Darrin Bruce McCullough was statutorily ineligible for probation unless unusual circumstances were found, and no unusual circumstances warranting probation existed, the trial court sentenced him to 10 years in state prison. Defendant contends we must remand for resentencing because the court improperly relied on matters not in the record. We shall affirm defendant's sentence. However, we shall award defendant additional presentence credits.

FACTUAL AND PROCEDURAL BACKGROUND

Case No. SF07-245B

On July 5, 2007, the People filed a complaint (later deemed an information) accusing defendant of manufacturing methamphetamine (count 1; Health & Saf. Code, § 11379.6, subd. (a)), possessing chemicals with intent to manufacture methamphetamine (count 2; Health & Saf. Code, § 11383, subd. (a)), possessing a controlled substance (count 3; Health & Saf. Code, § 11377, subd. (a)), and being a felon in possession of a firearm (count 6; Pen. Code, § 12021, subd. (a)(1); undesignated statutory references are to the Penal Code).[1] The information alleged as to count 1 that defendant was armed in the commission of the offense (§ 12022, subd. (a)(1)) and as to counts 1 and 2 that he had suffered a prior drug offense conviction (Health & Saf. Code, § 11370.2, subd. (b)).

On February 22, 2008, defendant withdrew his not guilty plea, pled guilty to count 1, and admitted a prior drug conviction.

On May 9, 2008, the trial court suspended imposition of sentence, placed defendant on probation for five years, and ordered him to serve 270 days in jail and to enroll in an outpatient drug treatment program.

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[1] A codefendant was charged along with defendant on count 3 and alone on counts 4 and 5.

On August 28, 2008, the probation officer filed an affidavit alleging that defendant had violated probation by using methamphetamine, failing to report to jail, and committing two new drug offenses. The probation officer nevertheless recommended continuing defendant on probation.

Case No. SF08-325

Before defendant could be sentenced on case SF07-245B, **o**n September 25, 2008, the People filed a new complaint (later deemed an information: SF08-325) charging defendant with manufacturing methamphetamine (count 1; Health & Saf. Code, § 11379.6, subd. (a)), being under the influence of methamphetamine (counts 2 & 4; Health & Saf. Code, § 11550, subd. (a)), and possessing drug paraphernalia (count 3; Health & Saf. Code, § 11364, subd. (a)). As to count 1, the information alleged that defendant had three prior drug offense convictions, including a prior violation of Health and Safety Code section 11371.6, and that he was on own-recognizance release at the time of the offense (§ 12022.1).

Also on September 25, 2008, the probation officer filed an affidavit alleging a violation of probation in case No. SF07-245B based on the new charges, and the People filed a notice of ineligibility for referral for deferred entry of judgment.

On March 30, 2009, defendant pled guilty to count 1 (manufacturing methamphetamine) in case No. SF08-325 and admitted the own-recognizance enhancement and prior convictions, in return for the dismissal of the other counts and a sentencing

lid of 15 years. Defendant also admitted the probation violation in case No. SF07-245B.

The probation officer's presentence report, filed on May 13, 2009, noted that defendant was statutorily ineligible for probation unless unusual circumstances were found, found no unusual circumstances warranting probation, and listed circumstances in aggravation: defendant's prior convictions as an adult were numerous and serious, he was on probation for the same offense when the crime was committed, and his prior performance on probation was unsatisfactory.

Having earlier requested that the case be transferred to Nevada County Mental Health Court to determine whether unusual circumstances existed, defendant formally moved for transfer on June 8, 2009. Following argument, the trial court denied the motion. The court then sentenced defendant to 10 years in state prison in case No. SF08-325 (the five-year midterm in case No. SF08-235, plus three years for the prior drug conviction under Health and Safety Code section 11379.6, plus two years for the own-recognizance enhancement; the other drug conviction enhancements were stricken), with a five-year concurrent sentence in case No. SF07-245B.

DISCUSSION

Defendant contends: "The trial court based its sentencing decision on 'evidence' not in the record, exceeding the statutory limitation on the receipt of information during the sentencing process and depriving [defendant] of his

constitutional right to the due process of the law." (Capitalization omitted.) By "'evidence' not in the record," defendant means the court's recollection of the reason -- never reduced to writing -- why defendant was rejected for drug court in case No. SF07-245B.

At sentencing, the colloquy about drug court came up in connection with the question whether defendant would be referred to mental health court. An expert, Dr. Don Stembridge, Ph.D., had earlier written a letter finding that defendant was "a reasonably good candidate for the Drug Court Program."

In discussing Dr. Stembridge's letter (as it bore on defendant's eligibility for a referral to mental health court) the following discussion occurred:

Judge Tamietti observed: "Dr. Stembridge's report . . . doesn't identify mental health issues that I usually see on the report that get people into mental health court. [The] report didn't disqualify [defendant] from drug court, which is usually what we see when somebody ends up in mental health court. [¶] So, you know, it's like a series of sieves that people go through. And if they're excluded from drug court because of a mental diagnosis, then that gets run to mental health court. And that was not the case with [defendant]. *He was actually offered drug court services and turned them down*." (Italics added.)

Defense counsel asserted: (1) After seeking admission to drug court and participating in programs from August to December

2007, defendant was excluded from drug court without a reason stated. (2) Counsel had been told that the drug court "team" did not need to state a reason for rejecting an applicant.

Judge Tamietti replied: "Right. Except the reason the team excluded him is he declined to go to inpatient[,] which is a component of drug court. *I was there. I remember. That's what happened*." (Italics added.)

Judge Tamietti thereafter imposed the state prison sentence mentioned above.

If a defendant is statutorily ineligible for probation absent a finding of unusual circumstances, the trial court has discretion to determine that unusual circumstances warranting probation do not exist, and we uphold this determination unless it is arbitrary and capricious. (*People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1587.)

Defendant argues in effect that Judge Tamietti's decision was arbitrary and capricious because he "significantly" relied on his uncorroborated and unreviewable memory as to why defendant was excluded from drug court, "rather than evidence presented in open court or contained in the probation report." We conclude that we need not decide whether Judge Tamietti should have considered his recollection on this point, because defendant ignores the evidence from the probation reports that Judge Tamietti expressly and chiefly relied on.

The question before the trial court was whether there were unusual circumstances warranting probation within the meaning of

rule 4.413 of the California Rules of Court. Judge Tamietti found that there were not. Although he cited defendant's purported refusal of "therapeutic services" as something that "works against him," Judge Tamietti mainly based his finding on the fact, shown in the probation reports, that defendant not only failed to comply with the conditions of probation but committed new drug offenses -- after having been warned plainly that the court's grant of probation in the prior case was defendant's last chance to avoid prison. Thus, defendant's assertion that "the trial court improperly based its sentencing decision on 'evidence' not properly before it" -- i.e., the court's own memory -- is incorrect.

Defendant does not dispute the probation reports' showing or explain why Judge Tamietti could not have relied on it. Nor does defendant explain what unusual circumstances existed that could have trumped his dismal performance on probation. In short, defendant has not shown that Judge Tamietti abused his discretion by finding that unusual circumstances warranting probation did not exist. Therefore, we need not decide whether Judge Tamietti should have relied on his memory of the case *in addition to* the undisputed evidence contained in the probation reports.

Furthermore, because this evidence is undisputed and plainly supports the ruling, there is no possibility of a different outcome on remand for resentencing. Thus, even if we were to find that it was an abuse of discretion to consider the

court's recollection of events, it could not be prejudicial on the whole record.

The parties have submitted supplemental briefing on the question whether amendments to section 4019, effective January 25, 2010, apply retroactively to defendant's pending appeal and entitle him to additional presentence credits. We conclude that the amendments do apply to all appeals pending as of January 25, 2010. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 [amendment to statute lessening punishment for crime applies "to acts committed before its passage provided the judgment convicting the defendant is not final"]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying the rule of *Estrada* to amendment allowing award of custody credits]; *People v. Doganiere* (1978) 86 Cal.App.3d 237 [applying *Estrada* to amendment involving conduct credits].) Defendant is not among the prisoners excepted from the additional accrual of credit. (Pen. Code, § 4019, subds. (b), (c); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) Consequently, defendant having served 158 days of presentence custody in the current case and 280 days in the probation revocation case, he is entitled to 158 days of conduct credits in the current case and 280 days of conduct credits in the probation revocation case.

DISPOSITION

Defendant's sentence is affirmed. The trial court shall correct the abstract of judgment to reflect the correct number of presentence credits, and furnish a certified copy of the

corrected abstract to the Department of Corrections and Rehabilitation.

SIMS, Acting P. J.

We concur:

HULL, J.

CANTIL-SAKAUYE, J.